71-1100

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 18558

UNITED STATES OF AMERICA,

Third Party Plaintiff Appellee.

vs.

STATE OF ILLINOIS,

Third Party Defendant Appellant.

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 18558

UNITED STATES OF AMERICA,

Third Party Plaintiff-Appellee,

vs.

STATE OF ILLINOIS,

Third Party Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in this proceeding on December 8, 1971. A Petition for Rehearing was denied on the 27th day of December, 1971.

THE OPINION BELOW

The Opinion of the Circuit Court of Appeals for the Seventh Circuit is not reported as yet and appears in the Appendix as pages One through Twelve *infra*.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 8, 1971. Jurisdiction of this court is invoked under 28 U.S.C. Section 1254.1. Among other reasons for the appeal is that there ought to be uniformity among the courts of the United States as to one of the issues involved in this cause, namely, whether the United States may, through a third party action for indemnity, obtain judgment against a state in a tort case.[1]

STATUTES INVOLVED

The statutory provisions involved are:

Chapter 37, Section 439 8 D of the Illinois Revised Statutes.

Title 28, Section 1346, U.S. Code

Article 4, Section 26 of the Illinois Constitution.

These statutory and constitutional provisions are set forth in the Appendix on pages 13 and 14.

QUESTIONS PRESENTED

1. Whether an unconsenting State has immunity from suit by the United States in a Third party action for indemnity for monies paid on account of a tort action.

1. In *Parks* v. *U.S.*, 241 F. Supp. 297, the court denied to the United States the power to file a third party action. Contrary, *Lee* v. *Brooks,* 315 F. Supp. 729 and *U.S.* v. *California,* 328 F. 2d 729.

2. Whether the amount of indemnity in such tort actions can exceed the amount set by the State for tort claims.

3. Whether on the facts as presented in this case the State of Illinois was liable to the United States for indemnity.

STATEMENT OF THE CASE

The original complaints in this case were filed on behalf of four individuals who were killed or injured at the 1966 State Fair. A unit of the United States Military Forces was performing with a rope attached to one end of a cat walk atop of the grandstand which was kept taut by a truck down below.

The Green Berets had for a long time prior to the accident, at public exhibitions throughout the country, staged their act, which consisted of having a taut rope, affixed at one end to a stanchion or roof of an edifice, with the other end attached to a truck pulled as taut as possible. A Green Beret would slide down the rope on a stretcher to demonstrate their ability either in combat or otherwise, to pass over physical obstacles.

The facts showed that on all occasions except the day of the accident, the marines had tested the rope when there was an empty grandstand but, that at the time of the accident, the test was made while there were spectators in the grandstand. The undisputed facts also proved that because there were trial time races going on for qualifying round races, the truck pulling the rope had to be moved further away from the stanchion on the roof

of the grandstand, therefore, the length of the rope had to be substantially increased.

On these facts the court found that the State had been actively negligent while the United States was passively so and entered judgment against the State and for the United States in an amount in excess of $600,000. The basis of that finding was that the manager of the State Fair required the Green Berets to tie their rope to an angle iron stanchion and no other places and represented that this stanchion was welded to the structure. It turned out that they were fastened by screws.

On these facts the United States was permitted judgment in a third party action against the State of Illinois for the amount that it had paid the claimants although the Illinois Statutes limit recovery to $25,000 to each individual.[2]

REASONS FOR GRANTING THE WRIT

I.

Whether a State may be impleaded pursuant to the provisions of Rule 14 in a tort case where the United States is not a party plaintiff in the case and whether Rule 14 can be interpreted to apply to one of the states and whether such application is in violation of the 10th Amendment.

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2. Chapter 37, Section 439 8 D of the Illinois Revised Statutes.

II.

Assuming that a state could be so impleaded, may judgment be granted against the State in favor of the United States in violation of the public policy of that state, that is, the statutes which limit recovery in a tort action to $25,000 for each individual.

ARGUMENT

I.

The sovereignty of an unconsenting State to be immune from suit by its own citizens has been repeatedly upheld.

The sovereign immunity should not lightly be disturbed; especially without express Congressional authority. Further, it is clear that the judgment invades the sphere of states rights which are reserved to the states by the 10th Amendment to the Constitution of the United States.

Further, if the judgment rendered against the State of Illinois is valid then in a similar matter a judgment might be rendered against a state for an astronomical sum. It is conceivable for instance that instead of four people being killed or injured in the situation herein involved, 4000 might have been.

It seems clear that the sovereign immunity from suit should protect the State of Illinois from a suit for indemnity by the United States and that the delicate balance of relations between the states and the United States should not be disturbed by decisions which ignore the basic principle that the sovereignty in this Union rests with the people and the Federal government has only those powers delegated to it by the people. To subject a sovereign state to a suit in a tort claim action beyond the limits set by it, completely destroys the fundamental principle of sovereignty. To permit the decision below to stand would be to permit the Federal government to nullify a provision of the Illinois Constitution. What could be more destructive to the ropes of unity that hold this nation together?

There is a conflict in the Federal Courts as to whether or not unconsenting states may be sued in third party actions for indemnity in tort situations.[3]

There are other cases along these lines but the conflicts and doctrines as set forth in the decisions are irreconcilable and this court has not spoken out on this issue.

This court has held in cases involving the exercise of property rights of states such as ownership of oil lands, boundary limitations, river beds and so forth[4], that it has jurisdiction to decide controversies in which a state is defendant but it is not so held in cases in which the state exercises its sovereignty.

In no case was an attempt made by the United States to obtain indemnification in a tort matter and in no case has this court passed upon the validity of such an action. That wide spread public interest exists is likewise shown in the law review articles which have been written in connection with the problems presented by this case.

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3. *Parks* v. *U.S.*, 241 F. Supp. 297; *U.S.* v *California*, 328 F. 2d 729; *Lee* v *Brooks*, 315 F. Supp. 729.

4. *U.S.* v. *Texas*, 339 U.S. 707 dealt with a boundary dispute; *U.S.* v. *California*, 332 U.S. 19 dealt with offshore oil lands; *U.S.* v. *Wyoming*, 331 U.S. 440 dealt with title to oil land; *U.S.* v. *Alabama*, 313 U.S. 274 dealt with whether the United States could have removed as a cloud on its title state tax liens on U.S. owned land; *U.S.* v. *Oregon*, 295 U.S. 1, dealt with the title to a non-negotiable lake; *U.S.* v. *Arizona*, 295 U.S. 174, was an original suit by the United States against Arizona with regard to the Colorado River; *U.S.* v. *West Virginia*, 295 U.S. 463, involved construction of a dam; *U.S.* v *Utah*, 283 U.S. 64, was a suit to quiet title to land which was part of the Colorado River; *U.S.* v. *Oklahoma*, 261 U.S. 253, was a suit in regard to priority of liens of a liquidating bank.

Some of these are: Michigan Law Review, Volume 64, page 948; Volume 13, U.C.L.A., 434; Volume 11, Stanford Law Review, page 665.

Some of the problems inherent in such matters are discussed in *Virginia* v. *West Virginia*, 238 U.S. 202, 246. U.S. 565, and the court left open the legality and advisability of awarding a mandamus to compel an action which was committed to the discretion of the legislature in ordering the levy of a tax and the court never settled the problem of enforcement of judgments and the court never settled the extent to which a State may be required to perform an action which required the exercise of legislative power.

We urge the court that the jurisdiction exercised herein by the Federal Courts should not have been exercised without express Congressional approval and that this court should accept jurisdiction of this appeal and settle the questions we have attempted to set forth in this presentation.

II.

But even were we to concede that the United States has the right and the Federal Courts jurisdiction in a third party action this judgment violates the public policy of the State of Illinois which limits personal injury claims to $25,000 each.[5]

In this case by suing the United States instead of suing the State of Illinois these parties were awarded an

5. Chapter 37, Section 439 8 D of the Illinois Revised Statutes.

average of over $150,000 per claim in violation of the public policy of the State of Illinois.

Further, if the positions of the courts below are correct then there was no liability at all on the United States[6] and the determinations as arrived at in this case merely permit a complete avoidance of the public policy of the State of Illinois and an enrichment of these plaintiffs far in excess of that permitted others injured in this State.

We point out to the court that even those cases which allow the filing of a third party claim by the United States against a State for indemnification of a tort holds that the right of the United States to recover is controlled by state law and the result reached by the Circuit Court of Appeals in this case is palpable error and ought to be reversed.[7]

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6. The Court said:

> "On the other hand, the trial courts only finding of Government negligence was its conclusion that the 'United States of America, through its agents, was negligent in that the Green Berets relied upon the representations of the agents of the State of Illinois and failed to conduct inspections adequate to reveal the manner in which the platform was affixed to the superstructure of the grandstand.' While we entertain serious doubt that the Government was shown to have been negligent at all, this question has been mooted by the Government's payment of the judgments against it."

7. *Lee* v. *Brooks*, 315 F. Supp. 729. Most recently the Circuit Court of Appeals for the 6th Circuit in *Hill* v. *U. S.*, 40 L W 2477 held that the United States cannot, in action against it for injuries caused by ROTC personnel during Tennessee State University football game, recover

III.

In our view, however, the finding of the court below that the United States was only passively negligent is palpable error.

The facts in this case are clear that the Green Berets had the sole control of their show; that they made the final decision where to tie the rope on the cat walk and that they physically pulled the cat walk from the roof. The court has completely ignored the evidence that the Green Berets could easily have determind the manner in which the stanchion was attached to the roof by looking and that the particular accident was caused by them lengthening the rope and pulling it taut when people were in the stands. To call all this passive negligence is palpable error.

CONCLUSION

For these many reasons then we urge the court to grant certiorari.

Respectfully submitted,

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contribution from state as joint tort-feasor since right to contribution is derivative of state's liability to injured party and, under doctrine of sovereign immunity, Tennessee could not be held liable to injured party.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1971—SEPTEMBER SESSION, 1971

No. 18558
UNITED STATES OF AMERICA,
Third Party Plaintiff-Appellee,

v.

STATE OF ILLINOIS,
Third Party Defendant-Appellant.

No. 18559
STATE OF ILLINOIS,
Fourth Party Plaintiff-Appellee,

v.

LLOYD'S OF LONDON,
Fourth Party Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Southern Division.
Civil Nos. 4187, 4189, 4236 and 4272
OMER POOS, *Judge*

DECEMBER 8, 1971

Before HASTINGS, *Senior Circuit Judge,* and PELL and SPRECHER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* This matter originated with the filing of four separate complaints on behalf of four individuals killed or injured at the 1966 Illinois State Fair, when a portion of a catwalk on top of the grandstand was pulled free from the roof during a performance by a United States Army Special Forces Unit, the Green Berets. The actions were filed against the United States of America[1] based on the alleged negligence of the Green Berets in performing their act.

United States brought a third-party action for indemnity against the State of Illinois contending that the negligence of the Green Berets, if any, was passive in nature, while Illinois was actively negligent and primarily responsible for the losses. Subsequently, Illinois in turn instituted a fourth-party action against Certain Underwriters at Lloyd's of London seeking recovery under a liability insurance policy for any amount for which Illinois might be held liable to the United States.

The four suits were consolidated for trial and were tried to the district court, without the intervention of a jury. The district court filed findings of fact, stated its conclusions of law and entered judgments thereon in favor of three of the plaintiffs against the United States in the aggregate sum of $637,847.03. After denying the motion of Illinois to dismiss the third-party complaint, the trial court held that Illinois was actively negligent as a matter of law and that the Green Berets were passively negligent, and determined that Illinois was required to reimburse the United States. The trial court further found and held that the subject insurance policy entitled Illinois to be reimbursed by Lloyd's of London.

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1. The complaints were brought under the Federal Tort Claims Act, Title 28, U.S.C.A. § 2671, et seq.

The United States paid in full the judgments against it by plaintiffs and plaintiffs are no longer concerned in these appeals. In No. 18,558, Illinois has appealed, and in No. 18,559, Loyd's of London has appealed.

The issues presented in No. 18,558 are (1) whether the district court had jurisdiction to implead and hear a third-party complaint for indemnity brought by the United States against the State of Illinois pursuant to Title 28, U.S.C.A. § 1345, and (2) whether the district court correctly found and held Illinois to be actively negligent and the United States to be only passively negligent and entitled to indemnity under the facts of this case.

The issue presented in No. 18,559 is essentially whether the automobile racing liability policy issued by Lloyd's of London applied to and covered the State of Illinois, not a named insured, and whether it applied to and covered the Green Beret performance in question. The United States is not a party to this appeal.

We deem it appropriate to make a brief statement of the underlying facts before proceeding to a discussion of the issues.

A Green Beret unit was invited by the manager of the Illinois State Fair to appear and perform as a part of the entertainment at the 1966 Fair on the State Fair Grounds in Springfield, Illinois. The State provided transportation, room and board for the twenty-one Green Berets who were to present two daily performance demonstrations from August 12 through August 21, 1966. The performance included, among other things, a demonstration of the techniques of traversing an open space by sliding down a rope attached at one end to a catwalk on the roof of the grandstand and kept taut by tying the other end to a truck or tractor on the ground below.

Prior to their August appearance, two officers from the unit made an inspection trip to the fairgrounds to determine how they might rig their various acts. At that time they were introduced to Ralph G. Heger, the long time manager, employed by Illinois, in charge of all the activities at the grandstand for the Fair. The officers inquired about an appropriate point to attach the elevated end of the rope to the grandstand, explaining they would need a firm place to tie down the rope used in rapelling and traversing. Heger represented to them that certain metal angle irons, which were part of the catwalk on the grandstand, were welded to the mental superstructure.[2] It was not possible then to get up on the roof to check the connection and the Fair manager did not provide the officers with available blueprints. Such blueprints would have shown that the angle irons were attached to the wooden roof with 1½" wood screws.

When the entire Green Beret Unit arrived at the Fair on August 11, 1966, Heger directed Sergeant Rumrill, who was in charge of the rope acts, to tie the rope only to the stanchions at that time, saying this was "the only safe place to tie." Rumrill was left only with the choice of which angle iron to tie on. Heger repeated such assurance and directions. Relying on this information, the Green Berets tied their rope at that point. They were subsequently denied permission to cut through the tarpaper roof to check the metal to metal connection and later were refused permission to tie at a different point for their own convenience.

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2. Heger's answer was "well, if you tie onto the stanchions going into the roof, the four by four steel beams going into the roof, they are welded, metal to metal to the superstructure."

The Green Berets performed their show several times on days prior to the accident. On the day of the accident, August 20, the rope was attached at one end to the angle irons at the catwalk and at the other end to a truck which had been repositioned from previous acts, resulting in more tension on the rope. The rope was pulled more taut by driving the truck away from the grandstand. While it was being tested for tautness, the moorings of the catwalk loosened and a portion of the catwalk fell upon the grandstand and race track below.

As a result of the fall of the catwalk, two photographers who were on the catwalk and Heger, standing on the ground, were killed and two spectators in the stands were seriously injured. At the time of the accident, time trials were being conducted on the race tracks for an upcoming automobile race.

After the accident, it was discovered that the metal angle irons were not welded or attached to the metal superstructure of the grandstand as represented by Heger, but rather were attached by screws to the wooden portion of the roof. Blueprints of the grandstand on file with Illinois, but not disclosed to the Green Berets, verified this condition. The Green Berets, relying upon this misinformation by Illinois, failed to inspect the manner of the attachment of the catwalk to the roof. Th trial court found, *inter alia*, that had the angle irons been attached "metal to metal" as represented by Illinois, they would have withstood the tension placed upon them.

No. 18,558

Illinois contends that the federal district court had no jurisdiction to impead the State of Illinois in the case at bar. It asserts immunity from such an action, claiming

(1) that it is barred by the Eleventh Amendment to the Federal Constitution and by Article IV, Section 26 of the Illinois Constitution; (2) that jurisdiction under 28 U.S.C.A. § 1345 extends only to suits "commenced" by the United States, and not to a third-party action; and, (3) that Rule 14 of the Federal Rules of Civil Procedure, 28 U.S.C.A., authorized impleader only of "persons", and that the State is not a person.

In our judgment, after reviewing the relevant authorities, the claim of immunity here is misplaced and the arguments advanced have been uniformly rejected by the federal courts.

The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The mere reading of this amendment makes clear that it has no application to suits brought by the United States for indemnity or for any other purpose. It applies to actions brought against a state by citizens of another state, which prohibition has now been extended to its own citizens, unless the State consents to be sued. *Truitt* v. *State of Illinois*, 7 Cir., 278 F. 2d 819, 820 (1960), cert. denied, 364 U.S. 866, and cases cited therein.

As in *Truitt*, *supra*, in the instant case the State of Illinois did not consent to be sued and, in fact, could not so consent in view of Art. IV, § 26 of its own Constitution, which provides: "The State of Illinois shall never be made defendant in any court of law or equity." Further, it may not be seriously contended that § 26, *supra*, immunizes the State from a suit by the United States. *United States* v. *Texas*, 143 U.S. 621, 646 (1892).

Congress enacted 28 U.S.C.A. § 1345 in its present form on June 25, 1948 (62 Stat. 933), which reads: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." A comprehensive scholarly review of the legislative history and the constitutional aspects of this legislation, together with subsequent judicial interpretation and well reasoned commentaries thereon, appears in Circuit Judge Browning's opinion, reported as *United States* v. *State of California*, 9 Cir., 328 F. 2d 729 (1964), cert. denied, 379 U.S. 817. We follow this decision and, Congress not having otherwise provided, hold that jurisdiction is vested in the federal district courts over suits by the United States against a state. It necessarily follows that a direct action by the United States against the State of Illinois for indemnity could have been filed in the federal district court. *See Parks* v. *United States*, D.C., N.D., N.Y., 241 F. Supp. 297, 299 (1965).

The instant claim for indemnity is merely a claim by the United States that it has suffered a loss by reason of the negligence of Illinois. The district court, having jurisdiction over an original action by the United States for indemnity, would have jurisdiction over the identical claim brought as a third-party action. We find no sound basis for a contrary result based on the nebulous theory that the original action was "commenced" by other plaintiffs. *See Chapman* v. *United States*, D.C., N.D., Ill. No. 66-C-2335, unreported, decided May 24, 1968, a comprehensive review of the law applicable herein; *Williams* v. *United States*, D.C., S.D., N.Y., 42 F.R.D. 609 (1967);

Lee v. *Brooks*, D.C., Hawaii, 315 F. Supp. 729 (1970); and *United States* v. *California supra*. *Parks* v. *United States*, *supra*, contra on this issue.[3]

Finally, Illinois urges that Rule 14, *supra*, of the Federal Rules of Civil Procedure, governing third-party practice, is applicable only to "persons", and that Illinois is not a person. We find no rational basis to support this contention, since the rationale of the foregoing authorities leads to a contrary conclusion. We need not analyze them further here. It is sufficient to note that whether the State is a person within the meaning of a federal rule or statute depends upon the legislative intent. *Sims* v. *United States*, 359 U.S. 108 (1959), where the Court, at page 112, in determining the meaning of the term "person" as used in a section of the Internal Revenue Code, includes a State, said that this "depends upon its legislative environment." The Court pointed out that although a statute may not expressly mention States among those it includes, it may become "equally clear that it does not *exclude* them". We conclude here, as the Court did in *Sims*, "that the subject matter, the context, the legislative history, and * * * the legislative environment, of * * * [Rule 14] makes it plain that Congress intended to and did include States within the term 'person' as used in * * * [Rule 14]." Illinois is not immune from this third-party action.

On the second issue, concerning *active* and *passive* negligence, we find overwhelming support in the record

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3. *Parks* appears to stand alone on this issue and has been disapproved by succeeding courts. It has been criticized by commentators, viz: 65 Col. L. Rev. 1506 (1965); 64 Mich. L. Rev. 948 (1966); and 13 U.C.L.A. L. Rev. 433 (1966).

evidence, as earlier herein set out, that Illinois was actively negligent. The misinformation furnished the Green Berets concerning the stanchions' metal to metal connection to the grandstand roof; the requirement that the rope be tied only to the stanchions on the roof, as the only safe place; the refusal to permit the Green Berets to carefully inspect and check the connection; and the failure to make the pertinent blueprints available, all lead to the inevitable conclusion that Illinois was actively negligent and primarily responsible for this accident and resulting injuries and deaths.

On the other hand, the trial court's only finding of Government negligence was its conclusion that the "United States of America, through its agents, was negligent in that the Green Berets relied upon the representations of the agents of the State of Illinois and failed to conduct inspections adequate to reveal the manner in which the platform was affixed to the superstructure of the grandstand." While we entertain serious doubt that the Government was shown to have been negligent at all, this question has been mooted by the Government's payment of the judgments against it.

Under well established Illinois law the determination of questions of active and passive negligence and their relationship to primary liability for injuries flowing therefrom are essentially questions of fact to be determined on a case by case basis. Illinois holds that "a passively negligent tort-feasor * * * [is allowed] to obtain indemnification from an actively negligent tort-feasor", *Miller* v. *DeWitt*, 37 Ill. 2d 273, 289-290 (1967), citing *Griffiths & Son Co.* v. *National Fireproofing Co.*, 310 Ill. 331 (1923); *Chicago and Illinois Midland Railway Co.* v. *Evans Const. Co.*, 32 Ill. 2d 600 (1965). *See also American*

Tel. and Tel. Co. v. *Leveque*, 30 Ill. App. 2d 120, 129-130 (1961).

Under the foregoing Illinois authorities, we hold that the State of Illinois was actively negligent and the United States was passively negligent and that by virtue thereof Illinois was properly ordered to indemnify the United States of America in full for all monies paid by it in this action.

No. 18,559

Fourth-party defendant Certain Underwriters at Lloyd's of London was signatory to Policy No. CL.16042, dated August 17, 1966, issued as an Automobile Racing Liability policy to "Illinois State Fair, The Illinois State Agency, General Manager, all personnel, and the United States Auto Club." The State of Illinois is not a named assured under the policy.

Within prescribed limits, the insuring agreement of the policy provides coverage for "* * * bodily injury * * * including death * * * sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the premises stated above for the purpose of automobile racing events, including practice and time trials on reported race days."

Exclusion 7 of the policy provides that "This policy excludes liability * * * arising from * * * any event, show or exhibition other than an automobile show, exhibition or race [including practice and time trials] * * * unless specifically agreed and endorsed hereon."

Without any supporting findings of fact, the district court concluded that under this policy of insurance "coverage of the State of Illinois was contemplated",

and ordered that Lloyd's of London pay to the State of Illinois "an amount equal to the payments for damages as provided by its policy of insurance and the costs", not in excess of policy limits.

Lloyd's of London contends on appeal that the Green Berets were not conducting or using the Illinois State Fair premises for the purpose of automobile racing; that the exhibitions by the Green Berets were separate and distinct from all other grandstand shows, including the automobile race conducted by the United States Auto Club; that the Green Berets' activities were not related in any way to the 100-mile automobile race being conducted on the day of the accident at the Illinois State Fair; that under the circumstances, the policy did not apply to the liability of the State of Illinois to the United States for its failure to give warning of the grandstand's construction for the Green Berets' activities; and, *inter alia*, that Exclusion 7 of the policy excludes coverage of the State of Illinois for negligently allowing the Green Berets to use the premises for a Green Beret event.

At the outset, it is significant to note that Illinois, neither on brief nor in oral argument, in any way replied to or challenged the contentions of Lloyd's of London in this appeal. Not being a party to this appeal, it becomes obvious why the United States has not responded.

Under the facts of this case, we readily conclude that the district court erred in its mixed findings of fact and conclusions of law on this question. We hold that the subject Automobile Racing Liability policy, as a matter of law, does not apply to the liability of the State of Illinois to the United States of America, and that the judgment of the district court in this appeal should be reversed.

In light of this opinion, the judgment of the district court in appeal No. 18,558 is affirmed and in appeal No. 18,559 is reversed.

AFFIRMED IN No. 18,558

REVERSED IN No. 18,559

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Illinois Revised Statutes, Chap. 37, Sec. 439.8d

(d) All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities, provided that an award for damages in a case sounding in tort shall not exceed the sum of $25,000 to or for the benefit of any claimant. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

(b) Subject to the provisions of chapter 171 of this District Court for the District of the Canal Zone and the title, the district courts, together with the United States District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, un-

der circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

CONSTITUTION OF ILLINOIS 1870

§ 26. The state of Illinois shall never be made defendant in any court of law or equity.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 19 1972
MICHAEL RODAK, JR., CLERK

No. 71-1100

In the Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1100

STATE OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 454 F. 2d 297. The district court's findings and conclusions (App. A, *infra*) and its opinion denying the motion to dismiss (App. B, *infra*) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1971, and a timely petition for re-

hearing was denied on December 27, 1971. The petition for a writ of certiorari was filed on February 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction to implead a State on the basis of a third-party complaint for indemnity brought by the United States.

2. Whether the lower courts correctly found that the State of Illinois had been actively negligent and the United States passively negligent.

STATEMENT

This suit was brought against the United States under the Federal Tort Claims Act on behalf of four individuals killed or injured at the 1966 Illinois State Fair, when a portion of a catwalk atop the grandstand broke loose during a performance by the Green Berets, an Army Special Forces Unit (Pet. App. A2).[1] The United States filed a third-party complaint

[1] The performance included a demonstration of traversing an open area by sliding down a rope anchored to a fixed object high above the ground and kept taut by a truck or tractor (Pet. App. A3). Petitioner's employee required the Green Berets to anchor the rope to the metal stanchions supporting the catwalk, which he represented to be welded to the grandstand's superstructure (Pet. App. A4). The stanchions in fact were attached with wood screws, and during one performance the pressure exerted in keeping the rope taut pulled the catwalk loose (Pet. App. A5).

against petitioner, the State of Illinois, alleging that the accident resulted from the active negligence of petitioner's employees, and that the Army's negligence was at most passive. The United States sought recovery under Illinois law, which permits a passively negligent tortfeasor to obtain full indemnity from an actively negligent tortfeasor, for any damages it might be required to pay the plaintiffs (Complaint, App. 7-9).[2]

The district court denied petitioner's motion to dismiss. It held (1) that the Eleventh Amendment to the Constitution did not immunize the State from suits by the United States, and (2) that neither Rule 14(a) of the Federal Rules of Civil Procedure, governing impleading, nor 28 U.S.C. 1345, giving the district courts jurisdiction of civil suits by the United States, barred the action (App. B, *infra*).

1. The evidence at the trial showed that prior to the date performances began, representatives of the Green Berets visited the fair grounds to determine where to attach the ropes used in their performance. The manager of the fair told them that his grandstand manager, Heger, would determine "where they would tie the ropes and when they would do it" (Tr. 79; see Pet. App. A4). After the officers explained they would need a secure anchoring point, Heger instructed them to tie the rope to metal stanchions protruding from the grandstand roof which supported the catwalk. Heger explained that the stanchions were

[2] "App." references are to the joint appendix in the court of appeals. "Tr." references are to the trial transcript.

"welded, metal to metal to the superstructure" of the grandstand (Pet. App. A4; Tr. 917).[3] At that time, it was not possible to gain access to the roof to check the connection, and the Fair Manager did not provide the Green Berets with available blueprints, which showed that the stanchions were attached to the roof only by small wood screws (Pet. App. A4).

When the entire Green Beret unit arrived at the Fair, Heger directed the non-commissioned officer who supervised the traversing to anchor his rope to the stanchions and no place else, leaving him the discretion only to choose which stanchion (Pet. App. A4). Later, when the Commanding Officer of the Green Berets asked permission to cut into the roof with a penknife to check the connection, Heger insisted the contact was welded and permitted no further inspection (Pet. App. A4; Tr. 451, 484).

Twice-daily performances began on August 12, and continued without incident until August 19. The Green Berets tested the rope's tautness just prior to descending the rope, "at the time that everybody was seated in their chairs for the appearance" (Tr. 336).[4]

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[3] The district court found that the stanchion would have withstood the strain placed upon it if it had been welded as Heger represented it was (Pet. App. A5; Finding of Fact 7, App. A, *infra*, p. 15).

[4] Petitioner states that the rope was tested while the stands were empty for every performance except the performance on the day the accident occurred (Pet. 3, 10). An employee of the State who operated the truck pulling the rope tight testified that this had been done while the audience was in place on every occasion; other testimony was to the same effect (Tr. 326, 336, 800, 827). See Finding of Fact 13, App. A, *infra*, p. 16.

Just before the performance on Saturday, August 20, Heger informed the Green Berets that the truck would have to be moved slightly to permit auto races to take place in front of the stands while the Green Berets were performing. After the truck was repositioned, and as it was pulling the line taut, the stanchion and a portion of the catwalk were pulled loose from the roof (Pet. App. A5; Tr. 795-797). Three individuals were killed and two spectators were seriously injured (Pet. App. A5).

2. The district court held (App. A, *infra*) the United States liable to the plaintiffs, and required petitioner to indemnify the United States. The court found that the Green Berets had been passively negligent in relying upon erroneous information given them by petitioner's employee—that the stanchions were welded to the superstructure and hence safe as an anchor-point—without conducting an adequate inspection to verify this information (Conclusion of Law 2, App. A, *infra*, p. 18).[5] The court found that petitioner was actively negligent and therefore was required under Illinois law to indemnify the United States (Conclusions of Law 2 and 9, App. A, *infra*, pp. 18, 21).

The court based this holding upon its findings that Heger, an agent of the State of Illinois, had told the

[5] The trial was interrupted on the second day so that the trial judge could observe the grandstand area. At that time it was apparent that the Green Berets could have climbed into a "crow's nest" underneath the roof and from there have observed that the metal superstructure did not extend to the catwalk area.

Green Berets the catwalk was welded when in fact it was attached to the roof with wood screws; had forbidden the Green Berets from cutting into the roof tar to determine if the stanchion was welded; had required the Green Berets to anchor the rope to the stanchion and refused permission to tie it anywhere else; and had failed to make available blueprints in the State's possession showing the actual connection (Findings of Fact 6, 7, 10, 12, 13, 16; App. A, *infra*, pp. 15-16, 17).[6]

The court of appeals affirmed, holding that the State of Illinois was not immune from suit by the United States in a third-party action. The court pointed out that the right asserted by the United States was a claim that it had suffered a loss by reason of the State's negligence, and that the United States could have brought an independent suit against the State on that claim (Pet. App. A7).[7] It held that the jurisdiction of the district courts under 28 U.S.C. 1345 over "all civil actions, suits or proceedings commenced by the United States" covers third-

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[6] The district court held that Illinois was entitled to be reimbursed in part under an insurance contract issued by Lloyd's of London. This determination was reversed on appeal (Pet. App. A11).

[7] Petitioner conceded in the court of appeals that it could be sued as an original matter by the United States: "While the United States has a right to sue the State of Illinois under the United States Constitution where it is a party plaintiff, it cannot implead the State of Illinois in a suit brought by citizens of Illinois against the United States. Rule 14 * * * only permits an impleader where the United States is an origial plaintiff" (Reply brief, p. 3).

party actions, and it rejected petitioner's argument that it could not be impleaded under Rule 14 because it was not a "person" within the meaning of the rule (Pet. App. A7-A8). The court affirmed the findings of active and passive negligence, noting that under Illinois law such questions "and their relationship to primary liability for injuries flowing therefrom are essentially questions of fact to be determined on a case by case basis" (Pet. App. A9).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the federal district courts lack jurisdiction to implead a State on the basis of a third-party complaint for indemnity brought by the United States. Petitioner fails to explain the reasoning underlying this contention. However, in citing *Parks* v. *United States*, 241 F. Supp. 297 (N.D. N.Y.), petitioner presumably takes the position that a State is not a "person" within the contemplation of Rule 14(a), Fed. R. Civ. P., which permits impleader of "a person not a party to the action who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him." [8] This position is not sustainable.

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[8] By citing *Parks* petitioner may also intend to assert that, without regard to the meaning of the word "person" in Rule 14(a), the district court's jurisdiction under 28 U.S.C. 1345 extends only to "proceedings commenced by the United States" and not to impleader by the United States in an action commenced by another party. However, it is commonly accepted that the federal courts have jurisdiction over impleaders by the United States. *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551-552. Such jurisdiction may be justified either on the

Impleader of state and municipal instrumentalities has long been permitted. See *Darby* v. *L.G. DeFelice & Son*, 94 F. Supp. 535 (E.D. Pa.), and *Schetter* v. *Housing Authority of the City of Erie*, 132 F. Supp. 149 (W.D. Pa.). Since the decision in *Parks* several district courts, in addition to the court below, have explicitly rejected its reasoning and have permitted the United States to implead a State.[9] *Williams* v. *United States*, 42 F.R.D. 609 (S.D.N.Y.); *Lee* v. *Brooks*, 315 F. Supp. 729 (D. Hawaii); *Chapman* v. *United States*, No. 66C2335 (N.D. Ill.), decided May 24, 1968; *Hill* v. *United States*, Civ. No. 4545 (M.D. Tenn.), decided March 19, 1969, reversed on other grounds, 453 F. 2d 839 (C.A. 6).[10] Furthermore this Court has held that the United States is a "person" for the purposes of Rule 14(a) and may be impleaded. *United States* v. *Yellow Cab Co.*, 340 U.S. 543.

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basis that the impleader is itself a "proceeding" for purposes of the statute or that power to settle the third-party claim derives from the doctrine of ancillary jurisdiction.

[9] The reasoning in *Parks* has also been severely criticized by commentators. See, *e.g.*, Note, 64 Mich. L. Rev. 948 (1966); Note, 65 Col. L. Rev. 1506 (1965). These comments do not demonstrate, as petitioner suggests (Pet. 7), a "wide spread public interest" in whether the United States may implead a State; rather they are devoted to showing that *Parks* was wrongly decided.

[10] Petitioner asserts (Pet. 7) that "[t]here is a conflict in the Federal Courts." In fact, there is only conflict within the Second Circuit. The court below is the only court of appeals that has decided this issue.

Petitioner offers no reason why the word "person" here should include the United States but not an individual State. There is nothing in the language, history, or purpose of the Rule which would justify such an interpretation. To the contrary, the impleader of states furthers the purpose of Rule 14(a), which is to promote judicial effiicency by eliminating circuity of actions.[11] See generally 6 Wright & Miller, *Federal Practice and Procedure:* Civil § 1442.

There are no constitutional barriers to the impleader of a State by the United States. The Eleventh Amendment protects the right of an unconsenting State to be immune from suit by its own citizens,[12] *Hans* v. *Louisiana*, 134 U.S. 1, but it does not apply to suits brought against a State by the United States. *United States* v. *Texas*, 143 U.S. 621. The United

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[11] In this case, for example, inability to implead petitioner would have necessitated an additional lawsuit. It would not have affected the right of the United States to institute a civil action against petitioner in a federal district court. District courts have jurisdiction over such original suits under 28 U.S.C. 1345. *United States* v. *California*, 328 F. 2d 729 (C.A. 9), certiorari denied, 379 U.S. 817; cf. 28 U.S.C. 1251(b). Nor would it have affected the substantive right of the United States to obtain indemnification from petitioner. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

[12] Petitioner suggests that the decision will nullify Art. 4 § 26 of the Illinois Constitution (Pet. 6, A14). However, this provision has been superseded by Art. 13, § 4, effective January 1, 1972, which provides: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

States here seeks recovery on its own behalf, not as an agent or on behalf of the original plaintiffs.[12]

The plaintiffs have no financial or legal interest in the third-party action; impleader does not result in their obtaining "some advantage inconsistent with the state's prerogative not to be sued by [them]." Note, 64 Mich. L. Rev. 948, 951. Thus there is no violation here of either the language or the spirit of the Eleventh Amendment. The decision by the court of appeals is correct and further review is not warranted.

2. Illinois law permits a passively negligent tortfeasor to recover full indemnity from an actively negligent tortfeasor. *E.g.*, *Miller* v. *DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630. The determination of the degree of negligence under Illinois law is basically a question of fact (Pet. App. A9). Both lower courts reviewed the evidence and concluded that the State had been actively negligent and primarily responsible for the accident, while the United States was only

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[12] This point should be sufficient to answer petitioner's contention (Pet. 8-9) that the recovery by the United States "violates the public policy of the State of Illinois which limits personal injury claims to $25,000 each" (Pet. 8): the claim of the United States was not for personal injury but for indemnity. Furthermore, a third-party plaintiff can recover even where a direct suit by the plaintiff against the third-party defendant is barred, *Corning Glass Works* v. *Puerto Rico Water Resources Authority, Inc.*, 396 F. 2d 421 (C.A. 1), and a state limitation upon the amount that may be recovered against it in its courts does not apply to suits by the United States in federal courts. *United States* v. *Nevada Tax Commission*, 439 F. 2d 435 (C.A. 9).

passively negligent. There is no occasion for this Court to review this factual determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1972.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Civil No. 4189

GENEVIEVE W. HEGER, Administrator of the
Estate of RALPH G. HEGER, dec'd.

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4236

WALTER KLINE

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4187

RONALD DREWETT

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4272

ANTHONY A. BLOEMER, Public Admr. of
Estate of DALE R. MUELLER

—*vs*—

UNITED STATES OF AMERICA

Civil Nos. 4189, 4236, 4187 and 4272

UNITED STATES OF AMERICA,
DEFENDANT AND THIRD PARTY PLAINTIFF

—*vs*—

STATE OF ILLINOIS, THIRD PARTY DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been submitted to the Court upon pleadings, upon the stipulation of certain facts agreed to between the parties herein and the oral testimony introduced in open court and the Court having considered the same and being well and fully advised, hereby makes the following Findings of Fact and states the following Conclusions of Law, to wit:

FINDINGS OF FACT

1. The subject matter of this action comes under the purview of the Federal Tort Claims Act, 28 U.S.C. 2671 et seq.

2. The defendant and the Third Party Plaintiff is the United States of America; and at all times relevant herein, the members of Company D, Seventh Special Forces Group of the United States Army, Fort Bragg, North Carolina, hereinafter called Green Berets, were agents, servants and employees of the United States Government and were acting within the scope of their employment.

3. The Third Party Defendant and Fourth Party Plaintiff is the State of Illinois.

4. The Fourth Party Defendant is Underwriters at Lloyd's, London. There was in effect at the time of the accident, a contract of insurance between

Fourth Party Defendant Underwriters at Lloyd's, London and the Illinois State Fair, the Illinois State Agency, General Manager, all Personnel, and the United States Auto Club. The said contract contained a clause in which Lloyd's agreed "to pay on the behalf of the Assured, all sums which the Assured shall become legally obligated to pay as damages because of: A(1) bodily injury, sickness or disease, including death at any time resulting therefrom sustained by any person, caused by accident, and arising out of the ownership maintenance or use of the premises stated above, for the purpose of automobile racing events, including practice and time trials on reported race days." The Limits of Liability of said policy are as follows: "The Underwriters' Liability for loss hereunder is limited to the sum of: Five-Hundred Thousand Dollars ($500,000.00) for bodily injuries or death of any one person, and Five-Hundred Thousand Dollars ($500,000.00) any one accident resulting in injuries to more than one person, and Five-Hundred Thousand Dollars ($500,000.00) for damage to property resulting from any one accident, the Assured to assume and pay the first $50.00 each accident resulting in property damage claim."

5. There is located in Springfield, Sangamon County, Illinois, property known as the Illinois State Fairgrounds, which is operated by the State of Illinois, by and through its agency known as the State Fair Agency, which property is used annually for purposes of putting on the Illinois State Fair. On August 20, 1966, said Illinois State Fair grounds and more particularly the grandstand and race track adjacent thereto, and activities conducted therein, were under the control and direction of the State of Illinois and on said date the State of Illinois was conducting auto-

mobile races, interspersed with other entertainment for which admission was charged to the general public.

6. There were on file with the State of Illinois in Springfield, certain blueprints and certain plans showing the construction and then present condition of a certain platform used for electric lights stationed on top of said grandstand. Said blueprints and plans showed that said platform, commonly called a catwalk, was approximately sixty-eight feet in length and consisted of boards fastened to angle irons, which said angle irons were attached to the wooden portion of said grandstand by 1½" wood screws and were not welded to any portion of the steel beams of the grandstand.

7. Ralph G. Heger, was at all times mentioned herein, an agent of the State of Illinois and represented to the Green Berets that the platform was welded to the superstructure of the grandstand, and that had this been true as represented the platform would have withstood the tension placed upon it.

8. Prior to the opening of the 1966 Illinois State Fair the State of Illinois invited the said Green Berets to appear and put on their exhibition during the fair, which invitation was accepted by the Green Berets after their officers had made an inspection trip in the City of Springfield at the State Fair Grandstand.

9. The said Green Berets were specially trained in conducting traversing and rappelling techniques and during the 1966 Illinois State Fair the said Green Berets put on numerous rappelling and traversing demonstrations and also exhibited ammunition, uniforms and other educational material in connection with the conduct of Green Beret activities.

10. The Commanding Officer of the Green Beret unit was forbidden by agents of the State of Illinois

from cutting into the roof of the grandstand to determine the manner in which the said platform was secured.

11. For their exhibition the Green Berets fastened a 7/16" nylon rope to one of the metal angle irons of said platform and attached the other end to either a tractor or a truck on the other side of the race track, depending upon which day it was used and said rope was stretched to a degree of tension sufficient to allow a man to traverse down the line to the vehicle.

12. The State of Illinois, having knowledge as to how said platform was attached to said roof, failed to inform the Green Berets of the same and more particularly after having witnessed the use of said platform and the tension placed upon the same on numerous occasions, made no attempt to warn the Green Berets nor to protect the public.

13. On August 20, 1966, the course of conduct followed by the Green Berets was identical to that followed on the previous days, except for the fact that the vehicle was moved further into the infield and away from the track, at the request of the automobile race officials, so that the traverse rope was high enough to allow the racing automobiles to pass thereunder during time trials which were being simultaneously conducted.

14. At approximately 1:15 P.M. on August 20, 1966, the rope was attached to the vehicle and stretched to the desired degree of tension, whereupon a portion of the said platform was loosened from its moorings and fell into the crowd below.

15. The Green Beret personnel relied on the information supplied by the State of Illinois and failed to inspect the manner of attachment of the said plat-

form to the superstructure of the grandstand from underneath said structure or by blueprints.

16. The State of Illinois through its agency, the State Fair Agency, and its agents retained at all times here pertinent, complete control of the physical premises of the grandstand and its environs, as manifested by the retention of the key to the roof of the grandstand and the requirement that civilians wishing to get on the roof had to secure a pass from the official agent of the Illinois State Fair Agency. The State of Illinois refused to allow the Green Berets to attach their rope to places atop the grandstand other than the ultimate tie-off point as suggested by the Green Berets and designated that the Green Berets tie their rope at the base of the stanchion supporting the catwalk.

On the day of the accident the repositioning of the tie-off vehicle created a less radical rope angle and thereby reduced the tension downward and increased the outward thrust on the platform, and said repositioning and consequent alteration of the thrust was a contributory cause of the accident.

17. The Court finds that Ralph G. Heger, an employee of the Theatrical Stage Union, Local No. 138, loaned to the State of Illinois, was not in exercise of due care for his own safety in that he made certain statements to the Green Beret personnel about matters which he knew or should have known he did not have sufficient expertise to make, and thereby materially contributed to his own death.

18. The Court finds that on August 20, 1966, the plaintiffs, Ronald Drewett, Walter Kline and Dale R. Mueller exercised due care and caution for their own safety.

CONCLUSIONS OF LAW

1. The Court hereby finds that the Court has jurisdiction over all parties to this lawsuit. Rule 12(h) Federal Rules of Civil Procedure. Wyrough and Loser, Incorporated v. Pelmor Laboratories, Incorporated, 376 F.2d 543 (CA 7) (1967). The law of the State of Illinois governs all substantive issues.

2. The defendant, United States of America, through its agents, was negligent in that the Green Berets relied upon the representations of the agents of the State of Illinois and failed to conduct inspections adequate to reveal the manner in which the platform was affixed to the superstructure of the grandstand.

The acts of the State of Illinois, through its employees, constituted negligence in that they were in complete control of the premises and environs of the grandstand; the agents of the State directed the Green Berets to tie-off the stanchions supporting the platform and forbid them to tie-off elsewhere on the roof of the grandstand; the State of Illinois had special knowledge of the construction of said platform and after observing its use, failed to warn the Green Berets of such construction and in fact prohibited the Green Berets from cutting into the roof of the grandstand to determine the manner of attachment.

The Court concludes that in view of the virtually complete direction and control exercised by the employees of the State of Illinois over the physical premises of the grandstand and the activities conducted thereabout, the acts of the employees of the State of Illinois constituted active negligence, and that the negligence of the employees of the United States of America constituted passive negligence. American Telephone and Telegraph Company v. Leveque, 30 Ill.

App. 2d 120, 173 NE 2d 737 (1961), John Griffiths & Son, Company v. National Fireproofing Company, 310 Ill. 331, 141 NE 739 (1923).

3. The court finds that the purported "agreement" between the State of Illinois and Dale R. Mueller is inadmissible in evidence as it is not an original document and no foundation was laid to allow the copy into evidence under the Best Evidence Rule. The Court also finds that no showing was made that the signature on the document was that of the decedent, Dale R. Mueller.

The "agreement" allegedly concluded between the State of Illinois and Dale R. Mueller has no bearing on this lawsuit as the cause of action brought by Anthony A. Bloemer, Public Administrator of the Estate of Dale R. Mueller, arose under the Illinois Wrongful Death Act at the time of death. Under the laws of the State of Illinois, a release or exculpatory agreement executed by the deceased before death does not bar a right of recovery for the benefit of statutory beneficiaries. Ohnesorge v. Chicago City Railway Company, 259 Ill. 424.

4. The plaintiff, Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller, sustained damages in the amount of Thirty Thousand Dollars ($30,000) from the occurrence here in question. By virtue of the passive negligence of its agents, the United States of America is liable to plaintiff Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller.

In consideration of these findings of fact and conclusions of law, it is hereby Ordered, Adjudged And Decreed that the United States of America pay Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller, the sum of Thirty Thousand Dollars ($30,000) and costs of suit.

The Court further finds that plaintiff Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller, sustained property damages in the amount of Two Hundred Sixty-Five Dollars ($265) and that the United States of America, by virtue of the passive negligence of its agents is liable to the plaintiff Anthony A. Bloemer in the sum of Two Hundred Sixty-Five Dollars ($265) and is hereby Ordered to pay such sum to plaintiff Anthony A. Bloemer.

5. The plaintiff, Grace M. Mueller, individually, sustained damages in the sum of Two Thousand Five Hundred Eighty-Two and 03/100 Dollars ($2,582.03) on account of the funeral expenses of Dale R. Mueller, and the defendant, the United States of America, by virtue of the passive negligence of its agents, is liable to the plaintiff, Grace M. Mueller, individually, in the sum of Two Thousand Five Hundred Eighty-Two and 03/100 Dollars ($2,582.03) and costs of suit, and a judgment is hereby entered in consideration of these Findings of Fact and Conclusions of Law against the defendant, the United States of America, in the sum of Two Thousand Five Hundred Eighty-Two and 03/100 Dollars ($2,582.03) plus costs of suit.

6. Genevieve W. Heger, as Administratrix of the Estate of Ralph G. Heger and Genevieve W. Heger, individually, is barred from recovery because it was not proven that the decedent Ralph G. Heger was in due care for his own safety and well being as required by Illinois law. Carter v. Winter, 32 Ill. 2d 275, 204 NE 2d 755 (1965), McKinney v. Illinois Power, 26 Ill. App. 2d 193, 167 NE 2d 249 (1960).

7. The plaintiff Ronald Drewett sustained damages from the occurrence here in question. By virtue of the passive negligence of its agents, the United States of America is liable to plaintiff Ronald Drewett.

In consideration of these Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged And Decreed that the United States of America pay the plaintiff Ronald Drewett the sum of Four Hundred Eighty Thousand Dollars ($480,000.00) plus costs of suit.

8. The plaintiff Walter Kline sustained damages from the occurrence here in question. By virtue of the passive negligence of its agents, the United States of America is liable to plaintiff Walter Kline.

In consideration of these Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged And Decreed that the United States of America pay the plaintiff Walter Kline the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) plus costs of suit.

9. The Third Party Defendant, State of Illinois, by virtue of the active nature of its negligence, is ordered to indemnify the United States of America, in full for all monies paid by defendant, United States of America, as set forth in this order.

10. Any ambiguity or doubt as to the proper construction of the contract of insurance between Underwriters at Lloyd's London and the Illinois State Fair, the Illinois State Agency General Manager, all Personnel and the United States Automobile Club, shall be resolved against the insurer. Forest City Insurance Company v. Hardesty, 182 Ill. 39, 55 NE 139, McAllister v. Hawkeye Security Insurance Company, 68 Ill. App. 2d 222, 215 NE 2d 477.

11. The State of Illinois is the sovereign body under which the Illinois State Fair Agency is organized and exists and, therefore, coverage of the State of Illinois was contemplated under the contract of insurance between Underwriters at Lloyd's London and the State Fair Agency.

12. The Court hereby concludes that the injuries to plaintiffs Ronald Drewett, Walter Kline and Dale R. Mueller, the result of the catwalk being pulled from the roof, arose out of the ownership, maintenance and use of the Illinois State Fair grandstand for purposes of automobile racing events.

13. Fourth Party Defendant, Underwriters at Lloyd's London is, therefore, Ordered to pay the Third Party Defendant, State of Illinois, in an amount equal to the payments for damages as provided by its policy of insurance and the costs of but not to exceed the applicable limits of said policy of insurance.

14. The attorneys for each of plaintiffs, Drewett, Kline and Bloemer, Administrator for Mueller, are awarded a sum equal to Twenty Per Cent (20%) of said judgments, as attorney's fees to be paid from the judgments so rendered, plus attorney's reasonable costs of suit expended.

15. Any finding of fact which is deemed to be a conclusion of law is hereby adopted as a Conclusion of Law.

Entered this 27th day of February, 1970, at Springfield, Illinois.

/s/ Omer Poos
United States District Judge
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Civil No. 4189

GENEVIEVE W. HEGER, Administrator of the Estate of RALPH G. HEGER, dec'd.

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4236

WALTER KLINE

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4187

RONALD DREWETT

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4272

ANTHONY A. BLOEMER, Public Admr. of Estate of DALE R. MUELLER

—*vs*—

UNITED STATES OF AMERICA

Civil Nos. 4189, 4236, 4187 and 4272

UNITED STATES OF AMERICA,
DEFENDANT AND THIRD PARTY PLAINTIFF

—*vs*—

STATE OF ILLINOIS, THIRD PARTY DEFENDANT

ORDER

This cause having heretofore been taken under advisement upon the motion of the State of Illinois, which motion moves this Court to dismiss the Third Party Complaint of the United States of America, in the above-entitled causes, the Court, being fully advised in the premises, and after due consideration of all the pleadings and written briefs submitted herein, finds that said motion to dismiss is not well taken and there is no merit in it.

Simply stated, the issue in dispute involves the interpretation of the plain words of Rule 14(a) of the Federal Rules of Civil Procedure. Those words mean what they say. Neither the Eleventh Amendment of the United States Constitution nor Section 26 of Article IV of the Illinois Constitution applies. The impleader action in question merely involves the United States of America against the State of Illinois; and, as against the United States, the State of Illinois has no sovereign immunity. No other meaning can be read into this third party complaint. See, generally, Rule 14(a), Federal Rules of Civil Procedure; 28 U.S.C. sections 1251(b)(2) and 1345; United States v. State of California, 328 F. 2d 729 (9th Cir. 1964) cert. denied 379 U.S. 817 (1964); Williams v. United States, 42 F.R.D. 609 (S.D. N.Y. 1967); and Chap-

man v. United States, as yet unreported opinion No. 66C2335 (N.D. Ill. E. D. 1968).

The Court also takes note of the salutary purpose of Rule 14(a) to consolidate common issues and eliminate duplicitous litigation, thereby preserving judicial energies and securing the just, speedy and inexpensive determination of every action. See also Rule 1, Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED that the motion of the State of Illinois to dismiss the Third Party Complaint of the United States be, and the same is hereby denied.

Entered this 3 day of February, 1969 at Springfield, Illinois.

/s/ Omer Poos
United States District Judge
Chief Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1100

UNITED STATES OF AMERICA,
Third Party Plaintiff-Appellee,
vs.
STATE OF ILLINOIS,
Third Party Defendant-Appellant.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Printed by Authority of the State of Illinois

IN THE

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UNITED STATES OF AMERICA,

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vs.

STATE OF ILLINOIS,

Third Party Defendant-Appellant.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REPLY MEMORANDUM

Respondent, by implication, has erroneously misrepresented the status of the doctrine of sovereign immunity in the State of Illinois. At page 12 of the Brief for the United States in Opposition to the Petition for Writ of Certiorari, footnote 12 reads:

> "Petitioner suggests that the decision will nullify Art. 4 § 26 of the Illinois Constitution (Pet. 6, A. 14). However, this provision has been superseded by Art. 13, § 4, effective January 1, 1972, which provides: 'Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.'"

One reasonable inference that can be drawn from this quotation is that the doctrine of sovereign immunity has been abolished in the State of Illinois. However, this is not correct.

Article XIII, § 4 of the Illinois Constitution of 1970 delegated to and authorized the Illinois General Assembly to prescribe the manner and form in which the State, if at all, may be sued.

Public Act 77-1776 maintained the doctrine of sovereign immunity in Illinois as provided under the Court of Claims Act, which in time was amended by Public Act 77-1777, effective January 1, 1972. The exceptions contained in the Court of Claims Act, and the amendatory language of Public Act 77-1777, are not relevant to the theory of this discussion. The Public Acts are set out in full in Appendix A.

Most recently, the Illinois Appellate Court, First District, First Division, had an opportunity to examine the status of the doctrine of sovereign immunity in Illinois in *Chicago Welfare Rights* v. *Edward T. Weaver, Director of the Illinois Department of Public Aid*, —— Ill. App. 2d ——, Case No. 56573 (1972).[1] In concluding that the doctrine of sovereign immunity is a bar to money judgments against the State of Illinois, Mr. Justice Dieringer, for a unanimous Court, found the status of the law to be as follows:

> "The Supreme Court of Illinois explained the prohibition against making the State a party defendant in a law suit in *Monroe* v. *Collins*, (1946) 393 Ill. 553:

1. This opinion has not yet been published, but a copy of it is included in Appendix B.

'The constitutional provision which prohibits the State from being a party in suits at law or equity is in aid of the State's sovereignty. In *In re City of Mt. Vernon*, 147 Ill. 359, we quoted from *Haus* v. *Louisiana*, 134 U. S. 1, with approval as follows: "*It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.*" And further, "The obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance, unless the State consents to be sued or comes itself into court."'

* * * * *

"But this general rule must now be interpreted to be modified by the rule of *Edelen* v. *Hogsett*, (1969) 44 Ill. 2d 215, when the suit involves money damages. In *Edelen*, the court made clear that Section 26 has been modified by the General Assembly in the form of the Court of Claims Act, Section 439, Chapter 37 of the Illinois Revised Statutes. That act provided for the Court of Claims to have exclusive jurisdiction of certain causes of action. Section 8 is pertinent to this litigation.

'The court shall have exclusive jurisdiction to hear and determine the following matters:

(a) All claims against the State founded upon any law of the State of Illinois or upon any regulation thereunder by an executive or administrative officer or agency, ***.'

"The reason for this exclusive jurisdiction is, as explained in *Edelen*, to provide for the expeditious centralized handling of the numerous claims against the State. Also in *Edelen*, the court noted:

'As we have heretofore pointed out, appellants filed this action in the circuit court, and insofar as is disclosed by the allegations in the complaint,

made no effort whatsoever to seek remedy against the State in the Court of Claims. Under such circumstances, it cannot be said that they are persons aggrieved by the prohibition of suits against the State embodied in the Illinois constitution as modified by the establishment of the Court of Claims.'

"In the case at bar we hold that the plaintiffs should have brought their suit in the Court of Claims to provide for the orderly disbursement of State funds if their suit were found to have merit.

"*The plaintiffs contend this case should be decided under the Illinois Constitution of 1970, but the result would be no different. The new constitution specifically delegates to the legislature the function of prescribing the manner and form in which the State is to be sued* (emphasis added). Section 4 of Article VIII of the Constitution of 1970 provides:

'Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.'

"On August 17, 1971, the Illinois Legislature responded by approving Public Act 77-953 which reenacted the Court of Claims Act."[2]

The rationale for maintaining the doctrine of sovereign immunity was well stated by the opinion in *Chicago Wel-*

---

2. It should be noted that Judge Dieringer's decision has two incorrect citations. The opinion refers to § 4 of Article VIII of the 1970 Constitution. The correct citation is Article XIII, § 4 of the 1970 Constitution. Of more importance is the incorrect citation of Public Act 77-953 as a reenactment by the legislature of the Court of Claims Act. Public Act 77-953 merely changed some of the language in the Court of Claims Act, and is not the reenactment of the Court of Claims Act. To clarify this point, a copy of Public Act 77-953 is also included as Appendix C.

fare Rights, supra. The State of Illinois must be permitted an opportunity to match costs with revenue. The State does not have infinite resources, and revenue must be matched with encumbrances of appropriations. If this were not permitted, it is conceivable that judgment orders of both state courts and federal courts could so encumber the State General Revenue Fund as to prevent the State of Illinois from performing its governmental functions and duties, including, but not limited to, the providing of mental health facilities, welfare assistance payments, aid to the physically handicapped, and delivery of health care facilities. There is a fine balance of budgeting to which the State of Illinois must adhere; and if the Seventh Circuit Court of Appeals decision were permitted to stand, a foreboding precedent would be existent to impair the ability of the State to budget its finances and deliver its much needed services. Unlike the federal government, the State of Illinois cannot indulge in deficit financing. The State cannot create dollars where none are existent. Fortunately, the federal government can do this through the interrelationship of the United States Treasury's borrowing power and the regulation of the money supply by the Federal Reserve system.

For these additional reasons, it is requested that a Writ of Certiorari be issued.

Respectfully submitted,

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3. (a) Actually, the Doctrine of Sovereign Immunity has never been abolished in Illinois. Articel VIII, § 4 of the Constitution of 1970 was effective and implemented as of January 1, 1972. Article IV, § 26 of the Illinois Constitution of 1870 was in full force and effect to January 1, 1972. See chronology in subsection (b).

(b) The Constitution of the State of Illinois was adopted in convention at Springfield, Illinois on September 3, 1970; ratified by the People, December 15, 1970; and, in force, July 1, 1971. The transition schedule of the 1970 Constitution contains the following relevant provisions:

TRANSITION SCHEDULE

The following Schedule Provisions shall remain part of this Constitution until their terms have been executed. Once each year the Attorney General shall review the following provisions and certify to the Secretary of State which, if any, have been executed. Any provisions so certified shall thereafter be removed from the Schedule and no longer published as part of this Constitution.

Section 1. Delayed Effective Dates.

Section 2. Prospective Operation of Bill of Rights.

Section 3. Election of Executive Officers.

Section 4. Judicial Offices.

Section 5. Local Government.

Section 6. Authorized Bonds.

Section 7. Superintendent of Public Instruction.

Section 8. Cumulative Voting for Directors.

Section 9. General Transition.

Section 10. Accelerated Effective Date.

SECTION 1. DELAYED EFFECTIVE DATES

(a) The provisions of Section 1, 2(a), 2(b), and 2(c) of Article IV shall not apply to the General Assembly elected at the general election in 1970. Notwithstanding Section 6(b) of Article IV, the incumbent Lieutenant Governor for the remainder of his term shall be President of the Senate with a right to vote when the Senate is equally divided.

(b) Section 9(a) of Article VII shall become effective on December 1, 1971.

(c) Section 2 of Article VIII shall become effective on January 1, 1972.

(d) The second sentence of Section 2 of Article XI shall become effective on January 1, 1972.

(e) Sections 2 and 4 of Article XIII shall become effective on January 1, 1972.

SECTION 9. GENERAL TRANSITION

The rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution. All laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution. The validity of all public and private bonds, debts and contracts, and of all suits, actions and rights of action, shall continue as if no change had taken place. All officers filling any office by election or appointment shall continue to exercise the duties thereof, until their offices shall have been abolished or their successors selected and qualified in accordance with this Constitution or laws enacted pursuant thereto.

APPENDIX A

(2)

STATE GOVERNMENT—IMMUNITY OF STATE AS DEFENDANT OR PARTY
PUBLIC ACT 77-1776
HOUSE BILL 2047

An Act in relation to immunity for the State of Illinois.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. [S.H.A. ch. 127, § 801]. Except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named", filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court.

Section 2. (S.H.A. ch. 127, § 801 note). This Act shall take effect on January 1, 1972.

Approved Dec. 10, 1971.
Effective Jan. 1, 1972.

(3)

COURT OF CLAIMS—AMENDATORY ACT OF 1971
PUBLIC ACT 77-1777

HOUSE BILL 2048

An Act to amend Sections 7, 8, 18, 20, 21, 22-1, 22-2 and 24 of "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act here named", filed July 17, 1945, as amended to add Sections 25, 26, 27, 28 and 29 thereto and to make an appropriation therefor.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 7, 8, 18, 20, 21, 22-1, 22-2 and 24 of "AN ACT to create the Court of Claims to prescribe its powers and duties and to repeal an Act herein named", filed July 17, 1945, as amended, are amended and Sections 25, 26, 27, 28 and 29 are added thereto, the amended and added sections to read as follows:

Sec. 7 [S.H.A. ch. 37, § 439.7]

The court shall record its acts and proceedings. The Secretary of State, ex officio, shall be clerk of the court, but may appoint a deputy, who shall be an officer of the court, to act in his stead. The deputy shall take an oath to discharge his duties faithfully and shall be subject to the direction of the court in the performance thereof.

The Secretary of State shall provide the court with suitable court rooms, chambers and such office space as is necessary and proper for the transaction of its business.

Sec. 8. [S.H.A. ch. 37, § 439.8]

The court shall have exclusive jurisdiction to hear and determine the following matters:

(a) All claims against the state founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act[1] or the Workmen's Occupational Diseases Act.[2]

---

1. Chapter 48, § 138.1 et seq.
2. Chapter 48, § 172.36 et seq.

(b) All claims against the state founded upon any contract entered into with the State of Illinois.

(c) All claims against the state for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted.

(d) All claims against the State for damages in cases sounding tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities, provided that an award for damages in a case sounding in tort shall not exceed the sum of $25,000 to or for the benefit of any claimant. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims pursuant to the "Law Enforcement Officers and Firemen Compensation Act".[3]

Sec. 18. [S.H.A. ch. 37, § 439.18]

The court shall provide, by rule, for the maintenance of separate records of claims which arise solely due to lapsed appropriations and for claims for which amount of recovery sought is less than $1,000. In all other cases, the court shall file with its clerk a written opinion in each case upon final disposition thereof. All opinions shall be compiled and published annually by the clerk of the court.

Sec. 20. [S.H.A. ch. 37, § 439.20]

At every regular session of the General Assembly, the clerk of the court shall transmit to the General Assembly a complete statement of all decision in favor of claimants rendered by the court during the preceding two years, stating the amounts thereof, the persons in whose favor they were rendered, and a synopsis of the nature of the claims upon which they were based. At the end of every term of court, the clerk shall transmit a copy of its decisions to the Governor, to the Attorney General, to the head of the office in which the claim arose, to the State Treasurer, to the Comptroller, and to such other officers as the court directs.

Sec. 21. [S.H.A. ch. 37, § 439.21]

The court is authorized to impose, by uniform rules, a fee of $10 for the filing of a petition in any case in which

3. Chapter 48, § 281 et seq.

the award sought is more than $50 and less than $1,000 and $25 in any case in which the award sought is $1,000 or more; and to charge and collect for copies of opinions or other documents filed in the Court of Claims such fees as may be prescribed by the rules of the Court. All fees and charges shall be forthwith paid into the State Treasury.

Sec. 22-1. [S.H.A. ch. 37, § 439.22-1]

Within six months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any action in the Court of Claims against the State of Illinois, the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System, or the Board of Governors of State Colleges and Universities, for damages on account of any injury to his person shall file in the office of the Attorney General and also in the office of the Clerk of the Court of Claims, either by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, a brief description of how the accident occurred, and the name and address of the attending physician, if any.

In actions for death by wrongful act, neglect or default, the executor of the estate, or in the event there is no will, the administrator or other personal representative of the decedent, shall file within six months of the date of death or the date that the executor or administrator is qualified, whichever occurs later, in the office of the Attorney Gen-

eral and also in the office of the Clerk of the Court of Claims, giving the name of the person to whom the cause of action has accrued, the name and last residence of the decedent, the date of the accident causing death, the date of the decedent's demise, the place or location where the accident causing the death occurred, the date and about the hour of the accident, a brief description of how the accident occurred, and the names and addresses of the attending physician and treating hospital if any.

Sec. 22-2. [S.H.A. ch. 37, § 439.22-2]

If the notice provided for by Section 22-1[1] is not filed as provided in that section, any such action commenced against the State of Illinois, the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System, or the Board of Governors of State Colleges and Universities, shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further action in the Court of Claims for such personal injury.

Sec. 24. [S.H.A. ch. 37, § 439.24]

The General Assembly hereby creates The Court of Claims Fund and shall make annual appropriations thereto from which the Court may direct immediate payment of:

(a) All claims arising solely as a result of the lapsing of an appropriation out of which the obligation could have been paid.

---

1. Chapter 37, § 439.21-2.

(b) All claims pursuant to the "Law Enforcement Officers and Firemen Compensation Act."[1]

(c) All other claims wherein the amount of recovery sought is less than $1,000.00.

Sec. 25. [S.H.A. ch. 37, § 139.24-5]

Any person who files a claim before the court shall, before seeking final determination of his claim exhaust all other remedies and sources of recovery whether administrative, legal or equitable; except that failure to file or pursue suits against State employees, acting within the scope of their employment, shall not be a defense.

Sec. 26. [S.H.A. ch. 37, § 139.24-6]

The granting of an award under this Act shall constitute full accord and satisfaction. There shall be but one satisfaction of any claim or cause of action and any recovery awarded by the court shall be subject to the right of set-off of an amount equal to the monies received from any other source, whether received in consideration of release or covenant.

Sec. 27. [S.H.A. ch. 37, § 439.24-7]

The provisions of this Amendatory Act of 1971 shall be severable, and if any provision of this Amendatory Act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of this Amendatory Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

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1. Chapter 48, § 281 et seq.

Sec. 28. [**S.H.A. ch. 37, § 439.24-8**]

This Amendatory Act of 1971 shall apply only to causes of action accruing on or after January 1, 1972.

Sec. 29. [**S.H.A. ch. 37, § 439.24-9**]

This Act shall be known and may be cited as the "Court of Claims Act."

Section 2. [S.H.A., ch. 37, § 439.7 note] The sum of $200,000 is appropriated to The Court of Claims Fund for the purposes set out in Section 24 of this Amendatory Act.

Section 3. [S.H.A. ch. 37, § 439.7 note] This Amendatory Act shall take effect on January 1, 1972.

Approved Dec. 10, 1971.

Effective Jan. 1, 1972.

APPENDIX B

56573 CHICAGO WELFARE RIGHTS ORGANIZATION, a not-for-profit corporation, et al., Plaintiffs-Appellees, v. EDWARD T. WEAVER, Successor to HAROLD O. SWANK, Director, Illinois Department of Public Aid, et al., Defendants-Appellants.	Appeal from Circuit Court, Cook County. Honorable Walter P. Dahl, Presiding.

MR. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

This class action was brought in the Circuit Court of Cook County by plaintiff welfare families under 42 U.S.C. 1983 for declaratory judgment, injunctive and other relief to implement 42 U.S.C. § 602(a)(23) [402(a)(23) of the Social Security Act], a 1968 amendment to the Social Security Act which provided a cost-of-living adjustment effective July 1, 1969, for recipients of Aid to Families with Dependent Children (AFDC). Release of benefits alleged to be wrongfully withheld by defendants was also sought. On August 30, 1971, the court entered a decree awarding the plaintiff class retroactive AFDC payments. Defendants appeal from that portion of the judgment. The decree also provided that the adjustment of the Illinois Department of Public Aid's (IDPA) shelter maximum

from $90 to $97 was correct rather than the increase of $90 to $100 asked for by the plaintiffs. The plaintiffs cross appeal from this portion of the judgment.

The State of Illinois is voluntarily taking part in the AFDC program of the Social Security Act, 42 U.S.C. § 601 et seq. On September 1, 1963, Illinois established a $90 per month maximum on the shelter allowance any recipient could receive. Section 202.7, Chapter 23, Illinois Revised Statutes, 1963. On January 2, 1968, Congress enacted § 402(a)(23):

> "[B]y July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximum that the State imposes on the amount paid to families will have been proportionately adjusted."

An HEW interpretation of 45 CFR § 233.20(a)(2)(ii), which refers to § 402(a)(23), states:

> "'By July 1, 1969' means the required updating will have been completed and all AFDC assistance payments will have been recomputed in accordance with revised amounts, and, if applicable, adjusted maximums and ratable reductions.
>
> " * * *
>
> "'Reflect fully changes in living costs since such amounts were established' means that the State agency must identify when the amounts to determine need were last priced. A cost study of the AFDC amounts should have been completed between January 2, 1968, and July 1, 1969, and the changes in living costs from the date the amounts were last priced should have been determined.
>
> " * * *

"Acceptable cost study methods

Method B [Used by the IDPA in this case]

a. Using the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index, for the appropriate region determine the current index price for the applicable items of living;

b. Calculate percentage change for the items in the index from the date the standard was last established to the present date; * * *

"'Will have been adjusted' means the amounts used by the State agency to determine need will have been corrected to reflect the changes in costs of living, since the amounts were last established. This adjustment in assistance standards must be made, even though other provisions regarding payment may offset it.

"Adjustment amounts and costs study must bear a reasonable time relationship between cost study and the application into agency regulations. A cost study in early 1968 which was reflected in the agency's standard effective July 1, 1968, meets the requirements of the Act. However, if the agency did not adjust its standards until July 1, 1969, the cost study in early 1969 would not be acceptable; a more current study is needed."

On May 29, 1969, the Illinois Department of Public Aid submitted to the Department of Health, Education, and Welfare (HEW) a report indicating that the revision of the shelter standard and allowance was "in process," and that the change would be in effect on July 1, 1969. Compliance, however, was delayed for a full year.

Harold Swank, Director of the IDPA, initially proposed to comply by adopting a graduated scale of shelter standards and maximums for families of five persons or more, but leave the $90 standard and allowance for families of

four or less untouched. He also suggested increasing the number of exceptions to the maximum which already existed by 2000. HEW objected that this did not conform to the regulations. Mr. Swank replied that he considered Illinois to be in conformity with the regulations and stated:

> "In Cook County and the outlying communities referred to above, the need for rentals over the $90 maximum has been recognized by the Public Aid Code since 1963. The number of exceptions authorized has gradually been increased, whenever the need for same has occurred to a total of 1,575 in August 1969 (1250 for Cook County and 325 for downstate). The actual number of exceptions used in September 1969 was 1,210 in Cook County and 273 downstate. Although this kind of up-dating by exceptions as the need occurs may not be considered ideal, it is practical in view of the circumstances and I believe that it does meet the Federal requirements."

HEW again rejected this proposal, and on April 22, 1970, Swank advised HEW of his proposal to bring IDPA into "technical conformity" by adjusting:

> "the State's maximum from $90 to $95, by reflecting the 5.9 percent increase in the rental component of the Bureau of Labor Statistics Consumer Price Index for the Chicago area from July 1, 1967, to January 1, 1970. The last action by the General Assembly relative to rent standards was with the enactment of the Illinois Public Aid Code in July 1967 at which time $90 was established as the maximum."

HEW accepted the resulting $5.00 increase in the maximum, but on July 13, 1970, the plaintiff Chicago Welfare Rights Organization wrote a letter to HEW alleging that the calculation for adjustment had been based on a period with an incorrect base. By letters of August 6, 1970, and

August 18, 1970, HEW advised Swank that September 1, 1963, and not July 1, 1967, was the correct base date. In the August 18th letter Edmund J. Siemicki, Deputy Regional Commissioner, Social and Rehabilitation Service, stated:

> "Secondly, it is clear that the period September 1, 1963, to July 1, 1969, would be acceptable measuring period:
>
> "'U.S. Department of Labor Bureau of Labor Statistics, rent index for September 1963 was 105.14. The same index for July 1969 was 113.4. This represented ———————— in the rent index for September 1963 ————————:
>
> Thus, the Illinois shelter maximum should have been increased from $90 to $97 (assuming that the State agency would round amounts under $.50 to the nearest dollar and amounts of $.50 and over to the next highest dollar. The correct measuring period is September 1, 1963 to July 1, 1969 (as provided in Section 402(a)(23) of the Act.'"

On August 27, 1970, Swank issued Official Bulletin 70.49 making an adjustment to $97. The plaintiffs assert that a terminal date of July 1, 1970, should be used because that is when the adjustment was first made. During the period from July 1, 1969, to July 1, 1970, shelter costs increased 3% representing an additional $3.00 a recipient must pay to obtain shelter. As a result, they assert the maximum should be raised to $100. On oral argument counsel for the plaintiffs estimated the cost of the arrearage to be $100,000, while the Attorney General said the cost would be several times that and there is no legislative appropriation for the money in the years past or at present.

Plaintiff families are all dependent upon the Illinois and Cook County Department of Public Aid, and they al-

lege they all have actual shelter costs in excess of the shelter allowance they have been receiving from the IDPA.

There are several issues presented on appeal. The only one we need consider is jurisdiction, that is, whether the award of retroactive benefits by the Circuit Court of Cook County violates Section 26 of Article IV of the Illinois Constitution of 1870. That section provides:

> "The State of Illinois shall never be made defendant in any court of law or equity."

The Supreme Court of Illinois explained the prohibition against making the State a party defendant in a law suit in *Monroe* v. *Collins,* (1946) 393 Ill. 553:

> "The constitutional provision which prohibits the State from being a party in suits at law or equity is in aid of the State's sovereignty. In *In re City of Mt. Vernon,* 147 Ill. 359, we quoted from *Haus* v. *Louisiana,* 134 U.S. 1, with approval as follows: 'It is an established principle of jurisdiction in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.' And further, 'The obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance, unless the State consents to be sued or comes itself into court."

The plaintiffs argue that the immunity of the State from suit does not extend to a State officer when he is enforcing an unconstitutional statute or is proceeding in violation of law. In *Schwing* v. *Miles,* (1937) 367 Ill. 436, the court said:

> "It is established that a suit against the department is a suit against the State * * * and will not lie. On the other hand, where the action at law or suit in equity is maintained against a State officer or

> the director of a department on the ground that, while claiming to act for the State, he violates or invades the personal and property rights of the plaintiff under an unconstitutional act, or under an assumption of authority which he does not have, such suit is not against the State."

But this general rule must now be interpreted to be modified by the rule of *Edelen* v. *Hogsett,* (1969) 44 Ill. 2d 215, when the suit involves money damages. In *Edelen,* the court made clear that Section 26 has been modified by the General Assembly in the form of the Court of Claims Act. Section 439, Chapter 37 of the Illinois Revised Statutes. That act provided for the Court of Claims to have exclusive jurisdiction of certain causes of action. Section 8 is pertinent to this litigation:

> "The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, * * *."

The reason for this exclusion jurisdiction is, as explained in *Edelen,* to provide for the expeditious centralized handling of the numerous claims against the State. Also in *Edelen,* the court noted:

> "As we have heretofore pointed out, appellants filed this action in the circuit court, and insofar as is disclosed by the allegations in the complaint, made no effort whatsoever to seek remedy against the State in the Court of Claims. Under such circumstances, it cannot be said that they are persons aggrieved by the prohibition of suits against the State embodied in the Illinois constitution as modified by the establishment of the Court of Claims."

In the case at bar we hold that the plaintiffs should have brought their suit in the Court of Claims to provide for the orderly disbursement of State funds if their suit were found to have merit.

The plaintiffs contend this case should be decided under the Illinois Constitution of 1970, but the result would be no different. The new constitution specifically delegates to the legislature the function of prescribing the manner and form in which the State is to be sued. Section 4 of Article VIII of the Constitution of 1970 provides:

> "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

On August 17, 1971, the Illinois Legislature responded by approving Public Act 77-953 which reenacted the Court of Claims Act.

For the above reasons, we find the Circuit Court was without jurisdiction to hear this case. The decree is reversed and the cause is dismissed.

DECREE REVERSED AND CAUSE DISMISSED.

BURMAN and ADESKO, JJ., concur.

APPENDIX C

COURT OF CLAIMS—JURISDICTION—RULES
PUBLIC ACT 77-953
HOUSE BILL 434

An Act to amend Sections 8, 9 and 15 of "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named", filed July 17, 1945, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 8, 9 and 15 of "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named", filed July 17, 1945, as amended, are amended to read as follows:

Sec. 8. [S.H.A. ch. 37, § 439.8]

The court shall have exclusive jurisdiction to hear and determine the following matters:

(a) All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act[1] or the Workmen's Occupational Diseases Act.[2]

(b) All claims against the State founded upon any contract entered into with the State of Illinois.

(c) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they

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1. Chapter 48, § 138.1 et seq.
2. Chapter 48, § 172.36 et seq.

were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted.

(d) All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, in a civil action, if the State were suable, and all claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $25,000 to or for the benefit of any claimant. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims for recovery of overpayment of premium taxes or fees or other taxes by insurance companies made to the State resulting from failure to claim credit allowable for any payment made to any political subdivi-

sion or instrumentality thereof. Any claim in this category which arose after July 16, 1945, and prior to July 11, 1957, may be prosecuted as if it arose on July 11, 1957, without regard to whether or not such claim has previously been prosecuted or determined.

Sec. 9. [S.H.A. ch. 37, § 439.9]

The court may:

A. Establish rules for its government and for the regulation of practice therein; appoint commissioners to assist the courts in such manner as it directs and discharge them at will; and exercise such powers as are necessary to carry into effect the powers granted in this Section.

B. Issue subpoenas to require the attendance of witnesses for the purpose of testifying before it, or before any judge of the court, or before any notary public, or any of its commissioners, and to require the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it. In case any person refuses to comply with any subpoena issued in the name of the chief justice, or one of the judges, attested by the clerk, with the seal of the court attached, and served upon the person named therein as a summons in a civil action is served, the circuit court of the proper county, on application of the clerk of the court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such court on a refusal to testify therein.

Sec. 15. [S.H.A. ch. 37, § 439.15]

When a decision is rendered against a claimant, the court may grant a new trial for any reason which, by the law applicable to civil actions between individuals, would furnish sufficient ground for granting a new trial.

Approved Aug. 17, 1971.